Supreme Court, U.S.
FILED

(1) 941315 JAN 31 1995

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

RICHARD G. BENNETT,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. There was a delay in excess of nine years between the date of the alleged murder and the filing of charges on May 22, 1987. The Arkansas State Police completed the investigation in early 1979 and the then-current prosecuting attorney declined to file charges on the case. Seven years later, a different prosecuting attorney initiated charges, even though two defense witnesses had died during the interim and evidence was lost or destroyed. The question presented:

WHAT IS THE CORRECT TEST FOR DETERMINING IF PROSECUTORIAL PREINDICTMENT DELAY AMOUNTS TO A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

II. In the state court trial, one juror was not a resident of the county in which the trial was conducted, even though she was a registered voter in the county of trial. Under Arkansas law, it is mandatory that a juror be a resident of the county in which the trial is conducted. The question presented for review:

WHETHER THE DEFENDANT MUST PROVE THAT THE JUROR'S LACK OF QUALIFICATIONS RESULTED IN ACTUAL BIAS OR PREJUDICE, PRECLUDING A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Richard Bennett, respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals denying his petition for writ of habeas corpus.

OPINIONS BELOW

Subsequent to the first state court trial, the Supreme Court of Arkansas reversed the judgment of conviction in *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988). Subsequent to the second jury trial, the Supreme Court of Arkansas reversed the judgment of conviction in *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436 (1990). On appeal from the third state court trial, the Supreme Court of Arkansas affirmed the judgment of guilty with life in prison in *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1991).

After *Bennett II* was decided by the Arkansas Supreme Court, a petition for writ of certiorari was filed with this Court, which petition was denied.

After *Bennett III*, a petition for habeas corpus was filed in the United States District Court for the Western District of Arkansas. Judge Jimm Larry Hendren entered a memorandum opinion denying the petition for writ of habeas corpus, which is an unreported decision. Judge Hendren entered an order granting the defendant's motion for a certificate of probable cause. The Eighth Circuit Court of Appeals by a decision filed on November 2, 1994 affirmed the decision of the district court in denying the petition for writ of habeas corpus. *Bennett v. Lockhart*, ___ F.3d ___ (1994).

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on November 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment VI of the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Amendment V of the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

> life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV, Section 1 of the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Arkansas Code Annotated §16-31-101 provides as follows:

> Every registered voter who is a citizen of the United States and a resident of the State of Arkansas and of the county in which he or she may be summoned for jury service is legally qualified to act as a grand or petit juror if not otherwise disqualified under the express provisions of this act.

5. Arkansas Code Annotated §16-31-102(a)(1) provides as follows:

(a) The following are disqualified to act as grand or petit jurors:

(1) Persons who do not meet the qualifications of §16-31-101;

STATEMENT OF THE CASE

On March 25, 1978, Richard Bennett and his wife, Marcia Good Bennett, were fishing off a bridge under construction over the Arkansas River near Morrison Bluff in Logan County, Arkansas. That night, Marcia Good Bennett drowned in the Arkansas River. The body of the deceased was recovered nine days later, and an autopsy was performed. The coroner listed "accidental drowning" on the death certificate. The medical examiner's report was consistent with the finding of accidental drowning. (First Trial Transcript, p. 302). The Arkansas State Police subsequently investigated the case and completed its investigation in early 1979 and submitted a complete investigative file consisting of four volumes to then Prosecuting Attorney Tom Tatum. The prosecuting attorney advised that he would not file charges against Bennett on the case, presumably because of insufficiency of evidence. Nine years later, on May 22, 1987, Richard Bennett was charged by felony information with first degree murder in the death of his wife.

At the trial of the case, the prosecution claimed Bennett pushed his wife off the Arkansas River bridge and subsequently Bennett entered the water and forcibly drowned Marcia Good Bennett. There were no eyewit-

nesses. At all times, Bennett has insisted upon his innocence and testified as to his innocence in the first two trials. The prosecution presented testimony that Bennett and the victim had been married for a little over three months at the time of death and that Bennett received approximately $30,000 in life insurance proceeds.

Bennett and his wife were from the Dayton, Ohio area and were visiting Arkansas to purchase property near Morrison Bluff in Logan County for the purpose of building a drive-through liquor store.

The State's case consisted of circumstantial evidence and alleged inconsistent statements on the part of Bennett. Joe Siebenmorgan was in his residence near the Arkansas River bridge on the night of the drowning, March 25, 1978, and between 10:30 and 11, he heard Mr. Bennett blowing the horn outside of his residence. Mr. Bennett was very wet, cold and shivering and advised that his wife had fallen off the bridge into the river. An ambulance was called at that time.

Danny Sorey testified that on March 25, 1978, he worked for the Logan County Emergency Medical Service and responded to the drowning incident. Mr. Sorey questioned the defendant, and Sorey testified that the defendant said he had jumped off the bridge behind his wife to try to save her and that he had been in the water for about an hour to an hour and a half trying to get her. Sorey checked on the EMS report that the defendant was suffering from shock. (Third Trial Transcript, p. 235).

Doug Stevens, the State Police investigator, testified as to the statement that he took from Mr. Bennett the day after the drowning and about another statement that was taken from Bennett three months later. (Third Trial Transcript p. 288). Bennett stated to Investigator Stevens that he and his wife, Marcia, were fishing off the Arkansas River bridge and, while he was reeling in the fishing lines to leave, Marcia fell into the water. The bridge was under construction and did not have the guard rails constructed. After she fell in, Bennett tried to use a rope to throw to her and then he jumped into the water to try to save her. (Third Trial Transcript p. 281).

Rodney Carlton testified for the State that he was the chief medical examiner for the State of Arkansas in 1978 and performed the autopsy on Marcia Bennett. The autopsy revealed no evidence of soft tissue injuries or blunt-force injuries. The medical examiner noted the cause of death was probable drowning.

Both former Sheriff William Hamilton and the current sheriff of Logan County, Bill Kimbriel, testified for the State as to their investigation of the scene. The investigative team searched for the body of Marcia Bennett for nine days before its recovery.

John Bailey testified for the State that he was formerly with the Arkansas State Police and assisted in the investigation of the drowning of Marcia Bennett. Bailey testified as to a lengthy interview given by Bennett after the drowning. Mr. Karl Glass was present during the in-

terview (Third Trial Transcript p. 415).

The State then called Gloria Good, who was the daughter of Marcia Bennett and who was 15 at the time of her mother's drowning. Gloria Good testified as to the promises made by Mr. Bennett about taking care of the children's future. She also testified as to disputes with Mr. Bennett concerning the handling of her mother's estate. Gloria Good was not present in Arkansas at the time of the drowning incident. After Gloria Good testified, the State of Arkansas rested its case, and the defense rested without calling any witnesses. (Third Trial Transcript p. 461).

From a procedural standpoint, the case was first tried to a jury on January 19, 1988, and Bennett was found guilty and sentenced to life in prison. The Arkansas Supreme Court reversed the conviction and remanded the case for a new trial. *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988). Bennett's motion for change of venue was then granted to Conway County, Arkansas, where the second trial commenced on April 17, 1989. Bennett was found guilty the second time and sentenced to life in prison. The Arkansas Supreme Court reversed the conviction and remanded the case for a new trial. *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436 (1990). The third trial commenced on April 2, 1991 in Conway County, Arkansas. During the third trial, Bennett was represented by appointed counsel. In the third trial, Bennett did not testify. Bennett was found guilty and sentenced to life in prison. The Arkansas Supreme Court affirmed the convic-

tion. *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992). During these proceedings, Bennett remained free on bond until his third conviction, at which time he was taken into custody, and is presently in the custody of the Arkansas Department of Correction in Grady, Arkansas.

Bennett exhausted his state remedies and filed a petition for habeas corpus relief in the district court. The case was assigned to the U. S. magistrate and, after considering the petition and the response of the State, the magistrate made her report and recommendation on April 8, 1993 recommending to the district court that the habeas corpus relief be denied. On December 16, 1993, the district court entered its order and judgment in this case, denying and dismissing the petition for habeas corpus relief. The district court's denial of the petition for writ of habeas corpus was appealed to the Eighth Circuit Court of Appeals, which filed a decision on November 2, 1994 affirming the opinion of the district court. Petitioner has filed this petition for writ of certiorari with the Supreme Court of the United States in a timely manner.

REASONS FOR GRANTING THE PETITION

1. This case presents an important, recurring and unsettled question regarding the burden of proof placed upon an aggrieved person in showing a violation of due process on account of delay in charging a suspect. There exists a split among the various circuits as to the correct test for determining if prosecutorial preindictment delay amounts to a violation of the due process clause of the

Fifth Amendment. In this case, the petitioner argued that he was prejudiced by the prosecutorial delay of nine years and two months in filing the charges against him. Despite the coroner's ruling that the drowning was "accidental," the petitioner became an immediate suspect. An investigation was initiated and completed by the Arkansas State Police in which the investigative report was delivered to the prosecuting attorney, Tom Tatum, in a four-volume set of reports and interviews. The prosecuting attorney reviewed the matter in early 1980 and declined to file any charges. The case was closed on March 19, 1980, based upon the decision of the prosecuting attorney not to file charges. Over seven years later, a new prosecuting attorney decided to file a murder charge.

The petitioner filed a motion to dismiss based upon precharging delay, which was denied by the trial judge in state court. This issue was reviewed by the Arkansas Supreme Court in *Bennett II*, 302 Ark. 179, 789 S.W.2d 436 (1990). The same issue was reviewed by the federal district court on a petition for writ of habeas corpus and by the Eighth Circuit Court of Appeals in *Bennett v. Lockhart*, ___ F.3d ___ (1994). The Eighth Circuit stated the rule of the circuit as follows

> To prevail in this circuit on a claim of violation of due process on account of delay in charging a suspect, the aggrieved person must 'prove that the delay was unreasonable and that it actually and substantially prejudiced the presentation of the defense.'

This Court has suggested that if the prosecutorial decision was made in "reckless disregard of circumstances" and the delay resulted in prejudice to the defendant, then the fundamental principles of due process would be violated. *United States v. Lovasco*, 431 U.S. 783, at 795, note 17, 97 S.Ct. at 2051, note 17 (1977). Since the *Lovasco* decision, there have been numerous decisions of the various circuits developing rules and applications which are at odds with each other. Only two circuits have concluded that prosecutorial misconduct is "not the *sine qua non* for a due process violation from a prosecutorial indictment." These circuits are the Fourth and Ninth in *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (Fourth Circuit 1985), and in *United States v. Valentine*, 783 F.2d 1413, 1416 (Ninth Circuit 1986). The Second Circuit has held that there is no due process violation unless the aggrieved can prove improper prosecutorial motive. *Hoo v. United States*, 825 F.2d 667 (Second Circuit 1988). *See* Justice White's dissent from denial of grant of certiorari in *Hoo v. United States*, 484 U.S. 1035, 108 S.Ct. 742, 98 L.Ed.2d 777 (1988). Other circuits have similarly required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation. *United States v. Ismaili*, 828 F.2d 153, 166 (Third Circuit 1987); *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (First Circuit), *cert. denied ante*, pp. 843, 857; *United States v. Caporale*, 806 F.2d 1487, 1514 (Eleventh Circuit 1986), *cert. denied*, 482 U.S. 917, 483 U.S. 1021 (1987); *United States v. Jenkins*, 701 F.2d 850, 854-855 (Tenth Circuit

1983).

The Fifth Circuit and the Seventh Circuit have expressed varying opinions through different panels on this issue. *Dickerson v. Louisiana*, 816 F.2d 220, 229, note 16 (Fifth Circuit), *cert. denied*, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 378 (1987); *United States v. Carlock*, 806 F.2d 535, 549 (Fifth Circuit 1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1611, 94 L.Ed.2d 796 (1987); *United States v. Perry*, 815 F.2d 1100, 1104 (Seventh Circuit 1987); *United States v. Hollins*, 811 F.2d 384, 387-388 (Seventh Circuit 1987).

The continuing conflict among the circuits on this important issue of constitutional law demands resolution by this Court.

In addition to the split among the circuits on the issue of intentional misconduct on the part of the prosecutor versus something less than prosecutorial misconduct, there exists a division among the circuits on the degree of prejudice that must be shown by the defendant in order to demonstrate a violation of his due process rights.

The various circuits approach the issue of prejudice in different ways. It appears that the distinguishing factor in the approach of the circuits as to how much prejudice is necessary to violate due process is the length of the delay. In those cases involving relatively short periods of delay, the circuits have had little trouble in finding that the aggrieved person failed to show substantial

prejudice. For example the Tenth Circuit case of *United States v. Jenkins* involved a delay of seven months. The court found that the defendant was unable to show "definite and not speculative prejudice." *Jenkins* at p. 855. The Tenth Circuit also addressed the second prong of the test set forth in *Marion* and *Lovasco* and said the defendant failed to show that the delay was purposefully caused by the government to gain tactical advantages or to harass.

In contrast, the Ninth Circuit, in *United States v. Valentine, supra,* balanced the length of the delay versus the degree of prejudice to the defendant. The court concluded that the length of the delay should be balanced against the reasons for the delay when "actual prejudice" has been shown. *United States v. Valentine* at 1416.

The Seventh Circuit considered a delay of 19 months in *United States v. Perry, supra.* In addressing the standard of prejudice necessary to sustain a due process claim for preindictment delay, the court stated as follows:

> When analyzing a defendant's motion to dismiss an indictment for preindictment delay, a court must look at the degree of prejudice the delay caused the defendant and the government's reason for the delay.

The Seventh Circuit indicates there should be a balancing between the degree of prejudice and the reasons for the delay. This is a different standard than applied by the Eighth Circuit in the instant case since there is no balancing between the degree of prejudice shown by

the defendant versus the reasons for the delay by the prosecution. The reasons for the delay by the prosecution were never addressed by the Eighth Circuit. The result is that a different standard has been applied by the different circuits.

The Fifth Circuit, in *United States v. Carlock, supra,* places a heavier burden on the defendant by requiring the defendant to show that not only the government intentionally delayed the indictment but that also the delay caused "actual and substantial prejudice." *United States v. Carlock* at p. 549.

In rendering the decision in the instant case, the Eighth Circuit lost sight of an important point of emphasis made by the Supreme Court in *United States v. Marion,* 404 U.S. 307 (1971). *Marion* made it clear that proof of prejudice is a necessary element of a due process claim but that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. The Eighth Circuit did not conduct an analysis of the reasons for the delay of nine years. If the Eighth Circuit had reviewed the record as to the reasons for the delay and determined that there was not any proper prosecutorial reason for the delay, then that should be balanced against the degree of prejudice shown by the defendant. In this case, the Eighth Circuit found that the death of a key witness (the local lawyer) prejudiced the defendant. The local lawyer's testimony was the only testimony available on the demeanor of the defendant and his wife on the night in question. The Eighth Circuit stated as follows regard-

ing this lost testimony:

> While testimony on the Bennetts' demeanor might have been useful, furthermore, we do not believe that its loss was so prejudicial as to have had an actual and substantial effect on the presentation of Mr. Bennett's defense.

From this, it appears the Eighth Circuit found that the defendant was prejudiced by the delay but not sufficiently prejudiced to meet the high standard of "actual and substantial" prejudice. It is the contention of petitioner that the Eighth Circuit should have balanced the degree of prejudice to the defendant with the length of delay of nine years and the reasons for the delay that would have been offered by the prosecution. The Eighth Circuit never reached this analysis despite a contrary case within the same circuit. In *United States v. Naftalin*, 534 F.2d 770 (1976), the Eighth Circuit pointed out that, as preindictment delay increases, the specificity with which prejudice must appear diminishes. *United States v. Naftalin* at p. 773. It can be argued that the prejudice must be assumed in light of the unreasonably long period of time between full governmental knowledge and charges being filed.

All of the cases reviewed by petitioner appear to be factually weak in regard to length of delay as compared to the instant case. Petitioner can find no case in which the preindictment delay was anywhere close to the nine years suffered by Mr. Bennett.

In summary, this Court should grant the petition because of the disagreement among the lower courts on the degree of prejudice required and whether the prejudice should be balanced against the length of delay and the reasons for the delay offered by the prosecution. In light of the disagreement among the lower courts and the importance of this question, review by this Court is warranted.

2. On the second question presented for review, the fact that a statutorily disqualified juror is allowed to sit and vote in a murder case is sufficient evidence in and of itself to demonstrate juror prejudice and to invalidate the verdict.

Under Arkansas law, any registered voter who is a "resident . . . of the county in which he or she is summoned for jury service is legally qualified" to be a juror in a state court trial. *See,* Ark. Code Annotated §16-31-101; *see also,* Ark. Code Annotated §16-31-102(a)(1). The third state court jury trial included a woman who was a registered voter in the county where the trial was held, but she was not a resident of that county. The defendant is entitled to an impartial jury that meets the statutorily defined guidelines. *See,* United States Constitution, Amendment 6; *see also,* United States Constitution Amendment 14, Sec. 1.

In *McDonough Power Equipment, Inc. v. Greenwood,* 646 U.S. 548 (1984), a juror failed to respond affirmatively to a question on a voir dire seeking to elicit

information about previous injuries to members of the juror's immediate family. This was in a products liability suit. The Supreme Court stated as follows:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

Clearly, Linda Brents, the juror in question, was disqualified, but the Eighth Circuit found that Mr. Bennett failed to demonstrate that the juror's lack of qualifications presented actual bias or prejudice affecting the juror's impartiality. *See, United States v. Humphries,* 982 F.2d 254, 261 (Eighth Circuit 1992), *cert. denied,* 114 S.Ct. 61 (1993).

This Court should review the standard applied by the Eighth Circuit since it violates the standard applied by this Court in *McDonough Power Equipment, supra.*

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,
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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-1215

Richard Bennett, Appellant,

v.

A. L. Lockhart, Director,
Arkansas Department of Corrections, Appellee

Appeal from the United States District Court
for the Western District of Arkansas

Submitted: September 15, 1994

Filed: November 2, 1994

Before HANSEN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In 1978, Marcia Bennett drowned in the Arkansas River near Paris, Arkansas. At the time, she and her husband of three months, Richard Bennett, were fishing from a bridge at night. They had come to Arkansas from Ohio to buy land for a local business. According to Mr. Bennett, he first threw a rope to his wife after she fell; he then jumped into the water but was unable to find her. Nine days later, her body floated to the surface, where it was found. The police questioned Mr. Bennett but closed their investigation in 1980, after the local prosecuting attorney decided not to prosecute him.

In mid-1987, nine years later, the state (in the person of a successor local prosecuting attorney) charged Mr. Bennett with the murder of his wife. (In early 1987, other members of Mrs. Bennett's family had obtained a civil judgment against Mr. Bennett for her wrongful

death.) Mr. Bennett was convicted by a state court jury in 1988, but the Arkansas Supreme Court reversed that conviction (depositions were used as prosecution evidence even though no showing of unavailability of the deponents was made). *See Bennett v. State*, 759 S.W.2d 799, 803-04 (Ark. 1988). A second state court jury convicted Mr. Bennett in 1989, but the Arkansas Supreme Court reversed that conviction as well (jury instructions were given at the beginning and not at the end of the trial). *See Bennett v. State*, 789 S.W.2d 436, 438-40 (Ark. 1990), *cert. denied*, 498 U.S. 851 (1990).

In 1991, after a three-day trial, a third state court jury convicted Mr. Bennett for the murder of his wife and sentenced him to life imprisonment. On appeal, the Arkansas Supreme Court affirmed that conviction. *See Bennett v. State*, 825 S.W.2d 560, 561, 564 (Ark. 1992).

Mr. Bennett petitioned for habeas corpus relief under 28 U.S.C. §2254 in federal district court in mid-1992. The petition was referred to a magistrate judge. *See* 28 U.S.C. §636(b)(1)(B). The magistrate judge filed a report about a year later, recommending that the petition be denied. In late 1993, the district court adopted the report and recommendations of the magistrate judge.

Mr. Bennett appeals the denial of his habeas petition. He contends that he was denied due process by the nine-year delay between his wife's death and the filing of charges against him, that he was denied a fair and impartial jury trial by the inclusion on the jury of a juror who did not meet the statutory requirements for jury service in his case, that he was denied the effective assistance of counsel by the state trial court's refusal to allow his law-

yer to argue a question related to the introduction of certain evidence, that a statement that he made to the police was improperly admitted, that he was denied due process by various evidentiary rulings of the state trial court, that the evidence was constitutionally insufficient for a conviction, and that he is actually innocent. We affirm the district court.[1]

I.

Mr. Bennett asserts that he was prejudiced by the nine-year delay between Mrs. Bennett's death and the filing of charges against him to such an extent that he was deprived of due process. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 790 (1977). To prevail in this circuit on a claim of violation of due process on account of delay in charging a suspect, the aggrieved person must "prove that the delay was unreasonable and that it actually and substantially prejudiced the presentation of [the] defense. . . . Under this standard, a showing of actual prejudice must first be established; if it is, the court will then inquire into the reasons for the delay and balance those reasons against the demonstrated prejudice." *United States v. Miller*, 20 F.3d 926, 931 (8th Cir. 1994), *cert. denied*, 1994 U.S. LEXIS 6525, 1994 WL 371695 (U.S. October 3, 1994).

"To prove actual prejudice, [the aggrieved person] must specifically identify witnesses or documents lost dur-

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[1]The Honorable Jimm Larry Hendren, United States District Judge for the Western District of Arkansas, adopting the report and recommendations of the Honorable Beverly R. Stites, United States Magistrate Judge for the Western District of Arkansas. *See* 28 U.S.C. §636(b)(1)(B).

ing delay properly attributable to the government. . . . The [aggrieved person] also must relate the substance of the testimony which would be offered by the missing witnesses or the information contained in lost documents in sufficient detail to assess accurately whether the information is material to the accused's defense. . . . Finally, the [aggrieved person] must show that the missing testimony or information is not available through substitute sources. . . . In sum, the [aggrieved person] must demonstrate that the prejudice *actually* impaired his ability to meaningfully present a defense" (emphasis supplied). *United States v. Bartlett*, 794 F.2d 1285, 1289-90 (8th Cir. 1986), *cert. denied*, 479 U.S. 934 (1986). Mr. Bennett contends that the delay in filing charges against him allowed the loss of the fishing equipment that he and his wife were using on the night of her death, the rope that he says that he threw to his wife, and a ring (evidently belonging to Mrs. Bennett) that he asserts that he gave to the sheriff's office (all apparently misplaced by the sheriff's office).

Mr. Bennett argues that the fishing equipment would have corroborated his account of the events surrounding his wife's death. He also argues that the fishing equipment would have contradicted testimony of the deputy sheriff (we identify witnesses by their title at the time of Mrs. Bennett's death) that one of the fishing rods was not "rigged for fishing" but had been "reeled in." As the magistrate judge pointed out, however, it has never been disputed that the Bennetts were fishing shortly before Mrs. Bennett drowned (the state's theory was that Mr. Bennett pushed his wife off the bridge and then

walked into the water himself from the shore and drowned her). We fail, therefore, to see what prejudice accrued to Mr. Bennett by the loss of the fishing equipment. *See, e.g., United States v. Bartlett,* 794 F.2d at 1290.

With respect to the rope, Mr. Bennett argues that it also would have corroborated his version of the events. The deputy sheriff testified, however, that the rope was found exactly where Mr. Bennett said it would be. We fail, then, to see what prejudice accrued to Mr. Bennett by the loss of the rope itself. *See, e.g., id.* In addition, since Mr. Bennett offers no explanation of the significance of the ring, we reject his suggestion that its loss was prejudicial to him.

Mr. Bennett also contends that the delay in filing charges against him allowed the loss of two witnesses who died during the interim—first, the person who issued fishing licenses to him and Mrs. Bennett, and, second, a lawyer who assisted Mr. Bennett in local land transactions. Because it has never been disputed that the Bennetts were fishing on the night in question, however, we reject the contention that the loss of the testimony of the person who issued the fishing licenses prejudiced Mr. Bennett. According to Mr. Bennett, the lawyer would have testified that Mr. Bennett had a "legitimate" purpose for the trip to Arkansas and that the trip had been preceded by "long term planning"; the lawyer also would have testified about the demeanor of the Bennetts shortly before the night in question, about the tangible evidence at the scene on the morning after Mrs. Bennett's death, and about Mr. Bennett's "total cooperation" in the investigation, including his willingness to take a polygraph test.

At trial, the state introduced, unchallenged, a statement that Mr. Bennett gave to a state police investigator three months after his wife's death. In that statement, Mr. Bennett related that he had been looking for property outside Ohio for about six months before his wife's death, that he had contacted the local lawyer about two months before his wife's death and had talked with a realtor and a bank as well, and that he had talked with the lawyer and several building contractors on the day before his wife's death. The state police investigator himself testified that Mr. Bennett "cooperated and gave . . . [the] statement" after "voluntarily" coming to the police department and answering questions and that there was "nothing that [Mr. Bennett] refused to answer." The sheriff testified, similarly, that Mr. Bennett "did what I asked him to do" and "answered my questions" the day after Mrs. Bennett's death. The state also introduced, unchallenged, photographs of the scene at the time Mrs. Bennett's body was found. Mr. Bennett has not alleged that the scene was different on that day from the day the lawyer was there.

In our view, the testimony of the local lawyer would have been cumulative to other evidence with respect to all of the topics specified by Mr. Bennett except the demeanor of the Bennetts shortly before the night in question. We decline, therefore, to find that the loss of testimony on those topics (except for the one specified) was prejudicial to Mr. Bennett. *See, e.g., United States v. Bartlett*, 794 F.2d at 1290. While testimony on the Bennetts' demeanor might have been useful, furthermore, we do not believe that its loss was so prejudicial as to have

had an "actual[] and substantial[]" effect, *United States v. Miller*, 20 F.3d at 931, on the presentation of Mr. Bennett's defense.

The local lawyer was also present during two interviews with Mr. Bennett by police officers; Mr. Bennett does not, however, specify whether or in what way the lawyer would have contradicted other evidence given with respect to the statements that Mr. Bennett gave in those interviews. We therefore reject Mr. Bennett's contentions that the delay in filing charges against him was so prejudicial as to amount to a violation of his due process rights.

II.

Under Arkansas law, any registered voter who is a "resident . . . of the county in which he or she [is] summoned for jury service is legally qualified" to be a juror in a state court trial. *See* Ark. Code Ann. §16-31-101; *see also*, Ark. Code Ann. §16-31-102(a)(1). Mr. Bennett's third state court jury included a woman who was a registered voter in the county where the trial was held but was not a resident of that county. Mr. Bennett contends that because that juror did not meet the statutory requirements for jury service in his case, he was denied his right to an "impartial jury," *see* U. S. Const. amend. VI; *see also* U. S. Const. amend. XIV, §1.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), the Supreme Court remarked that only those circumstances "that affect a juror's impartiality can truly be said to affect the fairness of a trial" and therefore to justify invalidating a jury verdict. In this circuit, in *United States v. Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992), *cert. denied*, 114 S.Ct. 61 (1993), the

court remarked that "[f]ailure to have one of the [statutory] juror qualifications . . . should not *necessarily* render an individual fundamentally unfit to serve" (emphasis supplied). In order to obtain a new trial in this circuit based on the service of a juror statutorily ineligible to serve, "it is incumbent upon the [aggrieved person] to clearly demonstrate that the juror's lack of qualifications presented actual bias or prejudice, affecting the juror's impartiality and [affecting] the fairness of the trial. A challenge after the verdict without a showing comes too late." *Id.*

The state trial court in Mr. Bennett's case held a hearing on Mr. Bennett's motion for a new trial on account of the statutorily unqualified juror. At that hearing, the juror conceded that although she used to live in the county where the trial was held, she had moved into an adjacent county at least a year before the trial. When asked if she remembered the state trial court asking if all of the venirepersons were "qualified electors" in the county where the trial was held, she responded, "I thought he meant was I eligible, you know, to vote in this county." Since she was still a registered voter in the county where the trial was held, she said, she answered affirmatively.

The Supreme Court has noted that "jurors are not necessarily experts in English usage. Called from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *McDonough Power Equipment, Inc.*, 464 U.S. at 555. "To invalidate the result of a . . . trial because of a juror's mistaken, though honest, response to a question, is

to insist on something closer to perfection than our judicial system can be expected to give." *Id.*

Because the juror acknowledged in addition, however, that she recalled another venireperson who had moved outside the county where the trial was held "[getting] up and [telling] the judge that she had moved and [then being] excused," Mr. Bennett argues that the juror intentionally withheld information that she knew would disqualify her from jury service in his case (Mr. Bennett offers no motive for such an action on the juror's part). When asked during the state trial court hearing if she "wonder[ed] whether or not [she] should have told [the judge] that [she] had moved . . . at that time," the juror responded, "Well, I did but I didn't know what to do since I was already picked, so I just sat there and kept my mouth shut. . . . I didn't know that it mattered." With reference to the other venireperson who was excused, the juror stated that she "just thought [that the other venireperson] was moving or something . . . [and] just didn't want to be on the jury." The juror denied that she "knowingly [gave] any kind of false answer . . . as to [her] residence." On questioning from the state trial court, the juror stated that she considered the county where the trial was held to be "[her] home," that she lived there "for almost 30 years," and that she left school in the ninth grade when she got married.

Taking all of the juror's testimony into account, the state trial court held that the juror "did not knowingly answer falsely any questions, that she was an unbiased juror and that [Mr. Bennett] was not prejudiced" by her service as a juror in his case. We give those findings "a

presumption of correctness," "in the absence of a more definitive problem in the record." *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir. 1988); *see also* 28 U.S.C. §2254(d). Mr. Bennett has offered no additional facts to contradict the record. Because the state trial court's findings are amply supported by the record, we reject Mr. Bennett's contention that he was denied an impartial jury.

III.

During his state court trial, Mr. Bennett acted as co-counsel with his lawyer. On the first day of trial, while Mr. Bennett was cross-examining the emergency medical technician who responded to the report of Mrs. Bennett's drowning, the lawyer moved to admit an exhibit. The state objected to both the lawyer and Mr. Bennett speaking for the defense during the cross-examination of the witness. In response, the state trial court declared, "Only one of you at a time can handle this part of the trial. In other words, you can't double team [the lawyer for the state]." When Mr. Bennett's lawyer replied, "[A]ll I've done is move to introduce [the exhibit] at the proper time," the state trial court answered, "One of you should do it. Not both." At that point, Mr. Bennett's lawyer said, "All right. I apologize to the Court. It wasn't intentional, we'll do it that way from now on." Mr. Bennett then resumed cross-examining the emergency medical technician.

Later in that cross-examination, the state made a hearsay objection to certain testimony. Mr. Bennett's lawyer interposed, "It's not offered, Your Honor—" but was interrupted by the state trial court, "I believe Mr. Bennett is conducting the inquiry." Mr. Bennett's lawyer respond-

ed, "All right." Mr. Bennett then again resumed cross-examining the emergency medical technician.

Mr. Bennett subsequently moved for the admission of several items of physical evidence (the alleged contents of his wallet on the night of his wife's death). The state objected, citing lack of foundation and failure to establish a chain of custody. Mr. Bennett's lawyer attempted to offer argument on the legal questions at issue but was rebuffed by the state trial court, which stated, "Only one of you can speak. You can confer." After Mr. Bennett and his lawyer conferred, Mr. Bennett offered argument on both the question of foundation and that of chain of custody. The state trial court sustained the objection.

At the end of the cross-examination of the emergency medical technician, Mr. Bennett's lawyer stated that he wanted to recall the witness on the next day "for the purpose of introducing these documents." The state trial court granted permission. At the beginning of the following day, however, after inquiry by the state trial court, Mr. Bennett's lawyer declined the opportunity to recall the witness. In closing argument, which took place on the third day of trial, Mr. Bennett's lawyer referred to the testimony of the emergency medical technician, stating, "We figured . . . why should I call [the emergency medical technician] back and subject the jury to the same type of inconsistencies between written and spoken word that we heard the first day. We've heard him. Why should I call him back. I checked his testimony, we don't want to put him back on the stand. He's already had his say and we think it's just as much for us as it was for the state."

Mr. Bennett now argues that he was deprived of

the effective assistance of counsel by virtue of the state trial court's restriction of his lawyer's attempt to argue the legal questions related to the introduction of the alleged contents of his wallet on the night in question. We see no constitutionally significant ineffective assistance of counsel occasioned by the actions of the state trial court.

In the first place, we do not believe that the state trial court's actions deprived Mr. Bennett of "reasonably effective" representation, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Bennett's arguments on the legal questions of foundation and chain of custody were made only after he was allowed to confer with his lawyer. Those arguments, moreover, were perfectly coherent and appropriately germane to the objections raised. We see no realistic likelihood that the state trial court's ruling, which was correct, in our view, would have been any different if Mr. Bennett's lawyer, rather than Mr. Bennett himself, had argued the legal questions.

Secondly, we fail to see that the state trial court's actions were in any way "prejudicial to the defense," *id.* at 692. Indeed, Mr. Bennett's lawyer explicitly declined the opportunity to recall the emergency medical technician, and Mr. Bennett said nothing. He makes no declaration now that he was somehow prevented from objecting to that decision by his lawyer. Given those circumstances, we reject Mr. Bennett's argument that the state trial court's restrictions on him and his lawyer deprived him of effective assistance of counsel.

IV.

Mr. Bennett contends that the state trial court improperly admitted a statement that he made to the

deputy sheriff and a state police investigator two days after Mrs. Bennett's death. Specifically, Mr. Bennett asserts that the statement was given in the absence of the warnings mandated under *Miranda v. Arizona*, 384 U.S. 436, 444, 467-68 (1966), for persons in custody. The magistrate judge found that Mr. Bennett was not in custody at the time the statement was made and therefore that *Miranda* was inapplicable.

The state trial court for Mr. Bennett's second trial held a hearing on Mr. Bennett's motion to suppress that statement. At that hearing, the deputy sheriff testified that he and a state police investigator "set up an appointment with [Mr. Bennett] to meet with him at the [motel] where he was staying. . . . At that time his lawyer was [the lawyer who had assisted Mr. Bennett in local land transactions] . . . and Mr. Bennett stated that he wanted his lawyer present when he talked [to] us." The deputy sheriff further testified that Mr. Bennett arranged for the local lawyer to be present for the interview, that Mr. Bennett and the lawyer "told us . . . what time to come," that Mr. Bennett and the lawyer were "waiting for us when we arrived at the motel," that the lawyer "stayed with him throughout the entire time," and that "when we left the two was left together." The deputy sheriff stated that "the only questions, if I can recall correctly, was just to ask—I think [the state police investigator] had asked Mr. Bennett to tell us what happened, and that was it. . . . I don't believe . . . I asked him any questions at all at that time." Mr. Bennett was not arrested after the interview.

On cross-examination, the deputy sheriff acknowledged that he was probably in uniform, wearing a badge,

and carrying a gun at the time of the interview. He also conceded that he was "very suspicious of the drowning from the very beginning" and that Mr. Bennett "would have been" the only suspect of either homicide or insurance fraud. He denied, however, that he in fact considered Mr. Bennett a suspect at the time, saying, "We were trying to . . . find out his version of what happened."

The state police investigator also testified at the hearing. He said that he "identified himself as being [a state police] investigator . . . and I . . . asked [Mr. Bennett] to explain to me what had happened, the circumstances surrounding his wife's death. And he went into detail with me about it . . . and . . . I took some very general notes at that point, and two days later dictated the interview." The state police investigator denied that he made "any threatening or coercive statements to Mr. Bennett to get him to give . . . this statement" and further asserted that "[a]t that point [Mr. Bennett] was not perceived by me as being a suspect of any crime."

On cross-examination, the state police investigator conceded that "from what [the deputy sheriff] related . . . Mr. Bennett was certainly a suspect in [the deputy sheriff's] mind" and that the incident "was treated as a criminal investigation." He also stated that although the local lawyer was present at the interview, "I didn't perceive him to be the attorney representing Mr. Bennett as a suspect."

Mr. Bennett himself also testified at the hearing. He stated that he "did not ask [the local lawyer] to come," that the lawyer "arrived at the same time the detectives did, or before," and that "I didn't even know they were coming." Mr. Bennett further testified that both the

deputy sheriff and the state police investigator stood between him and the door during the interview. After the hearing, the state trial court held that Mr. Bennett was "not in custody at the time. His freedom was not restrained." The state trial court then denied Mr. Bennett's motion to suppress the statement.

"*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) *(per curiam)*. In determining whether Mr. Bennett was in custody when he gave his statement to the deputy sheriff and the state police investigator, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on [his] freedom of movement' of the degree associated with a formal arrest," *California v. Beheler*, 463 U.S. 1121, 1125 (1983) *(per curiam)*, quoting *Oregon v. Mathiason*, 429 U.S. at 495.

The most relevant considerations in this determination are whether Mr. Bennett was told at the time that his cooperation was optional, that he was free to leave or to ask the police officers to do so, or that he was not under arrest; whether he had "unrestrained freedom of movement" during the interview; whether he "voluntarily acquiesced to official requests to respond to questions"; whether the police officers used "strong arm tactics or deceptive strategems"; whether the atmosphere during the interview was "police dominated"; and whether he was arrested after the interview. *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990). "It is not necessary to a finding of custody that all of the foregoing indicia be presented by the factual circumstances of a case, . . . and a

particularly strong showing with respect to one factor may compensate for a deficiency with respect to other factors." *Id.*

We see no reason to question the magistrate judge's conclusion that Mr. Bennett was not in custody when he gave the challenged statement. We do not know whether the police officers told Mr. Bennett that his cooperation was optional or that he was free to leave, but there was credible testimony that Mr. Bennett himself arranged the interview on request and that he was accompanied during the entire interview by a friend, the local lawyer. There is no evidence of "strong arm tactics or deceptive strategems," *id.*, nor was Mr. Bennett arrested after the interview. Although the deputy sheriff most likely considered Mr. Bennett a suspect of either homicide or insurance fraud, the deputy sheriff never voiced those suspicions. His views at that time, therefore, are irrelevant. *See, e.g., Stansbury v. California*, 114 S.Ct. 1526, 1529-30 (1994); *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Mr. Bennett testified that the police officers stood between him and the door, but he never stated that he felt "physical or psychological restraint," *United States v. Griffin*, 922 F.2d at 1347, because of that fact. Indeed, he did not even remember whether either police officer was in uniform. Given "the entire circumstances" of this case, *id.*, we reject Mr. Bennett's arguments with respect to the challenged statement.

V.

Mr. Bennett next contends that three particular evidentiary rulings of the state trial court were so prejudicial to him as to amount to a violation of his due process

rights. *See, e.g., Manning-El v. Wyrick*, 738 F.2d 321, 322 (8th Cir. 1984) *(per curiam), cert. denied*, 469 U.S. 919 (1984). In order to prevail in this circuit on such a claim, the aggrieved person "must prove that the asserted error was so conspicuously prejudicial or of such magnitude that it fatally infected the trial and deprived him of fundamental fairness. . . . In making this determination, we must review the totality of the facts in the case and analyze the fairness of the particular trial under consideration." *Id.* at 323.

Mr. Bennett first challenges the state trial court's ruling that the deputy sheriff could testify as an expert with respect to the likely result if a person jumped from a bridge 25 feet high into water five feet deep (as Mr. Bennett alleged that he did in an attempt to save his wife). On direct examination by the state, the deputy sheriff testified that he had 21 years of experience in the Marines, that he had "been through escape and evasion school . . . [and] abandon ship drills," and that he had jumped from a tower 40 feet tall into approximately 20 feet of water. When the state asked the deputy sheriff for his conclusion about "[w]hat would happen" if a person of Mr. Bennett's size (approximately six feet tall) jumped from a bridge 25 feet high into water five feet deep, the defense objected that the deputy sheriff was not an expert in such matters. The state trial court overruled the objection. The deputy sheriff then testified to his conclusion that under the circumstances specified, "You have nothing but pure weight falling. You have nothing there to break it. . . . You'll hit that bottom, your knees will come up and without any question, it would probably break your legs." The deputy

sheriff further testified that if a person in those circumstances were wearing glasses (as Mr. Bennett alleged that he was at the time), "it would have jarred him to such a point the glasses would have had to come off" if they were not "tied on" (Mr. Bennett alleged that his glasses got muddy but stayed on).

Mr. Bennett also asserts that the state trial court improperly restricted the defense cross-examination of the deputy sheriff. On cross-examination, Mr. Bennett (who was acting as co-counsel at that time) requestioned the deputy sheriff on his conclusions about a jump from a height of 25 feet into water five feet deep, then asked, "Then would you please tell me how an Olympic diver can come off of a 32 foot board, feet first, and never hit the bottom at nine and a half feet? They do it in all the Olympic college meets." At that point, the state objected to "this testimony by the defendant." The state trial court sustained the objection. In response to a subsequent question, the deputy sheriff remarked, "There's a lot of difference . . . between diving and jumping." Mr. Bennett then said, "I know, I spent two times in the Navy." The deputy sheriff went on, "You said Olympic divers. I've never seen an Olympic diver jump off a—" but was interrupted by Mr. Bennett, who asked, "32 feet?" The deputy sheriff subsequently said, "Jump or dive, sir?" Mr. Bennett responded, "Dive, with feet—that's okay, we won't go into that," and went on to a different topic.

We see no impropriety in the state trial court's ruling that the deputy sheriff could testify about the likely result of a jump from a bridge 25 feet high into five feet of water, given the deputy sheriff's statements about his

experience with jumps into water. Nor do we see any violation of due process in the state trial court's refusal to allow Mr. Bennett's own testimony about Olympic divers during his cross-examination of the deputy sheriff, especially in view of the fact that Mr. Bennett himself later acknowledged that there was "a lot of difference" between jumping and diving and, in fact, dropped the topic altogether shortly afterward, without any prompting from the state trial court. We see neither error by the state trial court nor prejudice from the challenged actions "of such magnitude that it fatally infected the trial and deprived [Mr. Bennett] of fundamental fairness," *Manning-El*, 738 F.2d at 323.

Finally, Mr. Bennett challenges the state trial court's ruling that Mrs. Bennett's daughter (from Mrs. Bennett's first marriage) could testify about various alleged "bad acts" of Mr. Bennett subsequent to his wife's death. Those acts were ordering that her body be cremated; selling all of the "household goods and furniture and things like that" at an auction (which Mrs. Bennett's three children picketed); becoming "cold and scary," which prompted the children to move to their maternal grandmother's house after three weeks of living solely with Mr. Bennett; and billing the children's grandmother for a proportional share of the children's social security money (received because their father, Mrs. Bennett's first husband, died while the children were minors) to reimburse Mr. Bennett for the three weeks that the children stayed with him.

Mr. Bennett himself cross-examined Mrs. Bennett's daughter. As far as we can tell from the transcript

of the state court trial, that cross-examination was at least as long as, and probably slightly longer than, the direct examination. In that cross-examination, which was essentially unrestricted by the state trial court, Mr. Bennett suggested that the auction had been ordered by the probate court, that he had "told [the children's] grandmother that [they] could pick up anything," that Mrs. Bennett was "in real bad financial condition" when she met him, that her daughter "resented" the marriage and "rebel[led] a good bit over it," and that her daughter "left because [he] asked [her] to do part of the work."

Given the facts that Mr. Bennett's suggestions (interposed in the form of questions) were made without objection from the state and that Mr. Bennett's cross-examination of Mrs. Bennett's daughter was quite thorough, we do not believe that the challenged testimony "fatally infected the trial and deprived [Mr. Bennett] of fundamental fairness," *Manning-El*, 738 F.2d at 323. We therefore reject his arguments with respect to that testimony.

VI.

Finally, Mr. Bennett argues that the evidence is constitutionally insufficient to sustain his conviction and that he is actually innocent. He offers no further evidence of his alleged actual innocence, however, so we decline to consider that claim.

"[T]he critical inquiry on review of the sufficiency of the evidence . . . must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]he relevant question is whether, after reviewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original). *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *see also id.* at 324, 326. We have read the entire transcript of Mr. Bennett's state court trial. In our view, a rational trier of fact, evaluating the evidence presented "in the light most favorable to the prosecution," *id* at 319, could conclude beyond a reasonable doubt that Mr. Bennett murdered his wife. We therefore reject his arguments with respect to the sufficiency of the evidence.

VII.

For the reasons stated, we affirm the judgment of the district court denying Mr. Bennett's petition for habeas relief.

A true copy. Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Criminal Investigation Section
Status Report

CID - 4
Date: 3-21-80
Dictated by: Sgt. Stephens
Date Typed: 3-25-80
Crime: unnatural death
Copies to: Lt. Evans, Sgt. Stephens

Specially Closed

On 3-19-80, Sgt. Doug Stephens and Investigator Dan Short, ASP-CID, met with Prosecuting Attorney Tatum at his office in Danville to discuss the filing of charges in this case.

Prosecuting Attorney Tatum told Sgt. Stephens and Investigator Short that as of now, unless some new evidence was developed, he did not intend to file charges against Richard Bennett in connection with the death of Marcia Bennett because he did not feel there was sufficient evidence to obtain a conviction, and it would be a waste of Logan County funds to file charges against Bennett and have to extradite him, and in his opinion they did not have a chance for a conviction at this time.

On 3-21-80 Sgt. Doug Stephens contacted Doctor Lowell Good who is the brother of the victim in this case, and informed Dr. Good that Prosecuting Attorney Tatum had decided not to file any charges against Richard Bennett in connection with this case; unless more evidence is developed.

File Number: C35-067-78

Magistrate's Report and Recommendation

In the United States District Court
Western District of Arkansas
Fort Smith Division

Richard Bennett, Petitioner,

v.

A. L. Lockhart, Director, Arkansas Department of Correction, Respondent.

Civil No. 92-2095

Petitioner Richard Bennett brings this habeas corpus action under 28 U.S.C. §2254 represented by retained counsel. We decide the issues by reference to matters in the file.

Discussion

In 1991, a Conway County jury[1] found petitioner guilty of first degree murder of his wife in 1978. He was sentenced to life in prison. The conviction was affirmed in *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992) *(Bennett III)*. Two prior convictions for the same offense have been overturned on appeal. *Bennett v. State*, 297 Ark. 115, 759 S.W.2d 799 (1988) *(Bennett I)*; *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436 (1990) *(Bennett II)*. Petitioner did not seek post-conviction relief under Ark. R. Crim. P. 37 after the third trial. We discuss below the issues raised here.

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[1]The trial was moved from Logan County to Conway County on motion of petitioner for change of venue.

Sufficiency of the Evidence

Petitioner claims there was insufficient evidence presented to the jury to sustain his conviction. The Arkansas Supreme Court held the evidence sufficient in *Bennett I* and this holding was found to be the law of the case in the later trials.

In *Bennett I,* the Arkansas Supreme Court summarized the proof as follows:

> In the main, the State's proof was based on inconsistent statements made by Bennett to various authorities on separate occasions and on inconsistencies between those statements and the physical evidence obtained by officers investigating the drowning.
>
> Dub Hamilton, the former sheriff of Logan County, was one of the first officers to interview Bennett. In a statement to Hamilton on March 26, Bennett described the first few moments before the incident as follows:
>
> > Marcia and I were fishing side by side on the bridge. We had fished quite some time and she was cold. I told her we may as well quit. I reeled in one pole. As I was preparing to take.the bait off and put the pole up, Marcia took a couple of steps toward her pole. The next thing I heard her yell and when I looked up, her and the lan-

tern was gone.

Bill Kimbriel, Hamilton's chief deputy, testified that he did not recall that the second pole was rigged to fish when he found it on the bridge near where Marcia Bennett allegedly fell.

In a separate statement made on March 27 to Kimbriel and to John Bailey, a former criminal investigator for the Arkansas State Police, Bennett's story changed. He told Bailey that he had rigged his wife's pole for fishing and had returned to the car to get some more fishing tackle when he heard his wife scream. Already at the car, Bennett turned around and Marcia was gone from the bridge. Some three months later when visiting with Doug Stevens of the Arkansas State Police, Bennett again changed his story to reflect the earlier version given to Sheriff Hamilton

There were other inconsistencies. At trial, Hamilton testified that on the night of March 25 he had noticed Bennett's glasses had mud with water on them. Bennett could not explain how his glasses had stayed on after he supposedly jumped from the bridge to the water below and then swam from pier to pier in search of his wife.

The height of the bridge was measured at 24 to 27 feet depending on the point of measurement on the bridge. The depth of the water around the bridge was estimated at three to five feet with isolated pools near the bridge supports measuring between

eight and ten feet. At least once, Bennett maintained that he had not hit bottom when he jumped from the bridge. Deputy Sheriff Kimbriel testified from experience that a jump of 27 feet into water three to five feet deep would not only have caused Bennett to hit bottom but that the jump would certainly have buckled Bennett's knees and jarred his head upwards and that it would have been impossible for Bennett's glasses to stay on.

Bennett had also indicated to the officers that the current around the bridge had been very strong. Kimbriel testified that there was no current in the area. Hamilton also testified that there was no current in the waters surrounding the bridge near Morrison Bluff.

In light of evidence concerning the lack of current in the river, the State's case emphasized that Marcia Bennett's body was not discovered until it surfaced four to five hundred feet from where Bennett claimed Marcia had fallen into the water nine days earlier. Hamilton testified that when the body surfaced, it remained absolutely stationary until removed by the medical examiner. Further emphasis was placed upon the fact that the body was not discovered anywhere near the site of the alleged fall despite extensive dragging operations.

Danny Sorey, an emergency medical technician, attended to Bennett for possible hypothermia or exposure on the night of the incident. Sorey testified that Bennett

had been wearing slip-on type shoes, slacks, a tee shirt, and a shirt. Bennett told Sorey that he had been in the water for an hour or more.

Sorey testified that Bennett showed no signs of hypothermia and that his condition (i.e., body temperature, behavior, etc.) was inconsistent with Bennett's statement that he had been in the icy water for an hour or more. In his subsequent statement to Investigator Doug Stevens, Bennett stated that he could not remember how long he had been in the river.

Further testimony by Sorey revealed that Bennett's shoes, though wet, did not contain any mud or other residue from the muddy water or the river bottom. Bennett's wallet was wet, but the contents were dry.

Sorey indicated that Bennett was primarily concerned for the safety of about $800.00 in bills in his wallet and that Bennett never expressed sorrow about the possible death of his wife. Bennett also told Sorey that at one point he had "gotten ahold of his wife" but that the current pulled her away, a fact which Bennett failed to relate to either Kimbriel, Hamilton or Bailey.

At trial, both Kimbriel and Hamilton describe the clothing found on Marcia Bennett's body after it surfaced on April 4. She was dressed in thermal underwear, pants, a wool shirt, two sweaters, boots, and gloves. Officer Hamilton considered it significant that Marcia Bennett was found wearing

gloves in light of statements by Bennett that when Marcia fell from the bridge into the water Bennett had told her to remove her jacket and a blanket, which she allegedly did. (Officers later recovered both the jacket and the blanket.) Hamilton testified that he thought it would have been very difficult for Marcia Bennett to remove her jacket in the water while still wearing the gloves found on her nine days later.

In *Smith v. State*, 282 Ark. 535, 669 S.W.2d 201 (1984), this court affirmed a sentence of life imprisonment for first degree murder where the State's evidence was entirely circumstantial. We stated that guilt may be proven even in the absence of an eyewitness to the crime, and we emphasized that *false and improbable statements explaining suspicious circumstances are admissible as proof of guilt. Id.* at 358. Few statements of law have greater relevance to the evidence presented to the fact finder in the case at bar.

The State introduced additional evidence which was consistent with Bennett's guilt but which we need not detail in great length. Bennett's former girlfriend, Connie Mosier, testified by deposition that she had accompanied Bennett to the Morrison Bluff bridge prior to his marriage to the victim and that Bennett had commented, 'This would be a good place to kill someone.' Don Buckner, Bennett's insurance agent from Ohio, testified by deposition that Bennett called several times prior to the 1978 Arkansas trip to see if an insurance

> policy on Marcia Bennett's life had been approved and had come into the office. According to Buckner, Bennett picked the policy up on or about the day the couple left for Arkansas from Ohio. Bennett was named the beneficiary. Buckner also testified that Bennett was upset (after Marcia's death) when he discovered that the policy was not of the double indemnity type.
>
> Based on the foregoing, we conclude that there is substantial evidence to support the verdict of guilt. As such, we find no error in the trial court's refusal to direct a verdict in Bennett's favor.

Bennett I, 297 Ark. at 119-122.

The *Bennett I* conviction was reversed because the Mosier and Buckner depositions were improperly introduced into evidence. In *Bennett III*, the Arkansas Supreme Court found the trial evidence essentially the same as in *Bennett I* except that Mosier did not testify. The trial transcript of *Bennett III* also reflects that Buckner did not testify. In addition, Gloria Good, the deceased's daughter, testified in *Bennett III* as she did in *Bennett II* that her mother died three months after her marriage to petitioner who became cold and financially greedy to her and her siblings after her mother's death. Further, John Bailey of the Arkansas State Police explained that petitioner told him he had taken out an insurance policy on his wife since their marriage.

The scope of review of a claim of insufficient evidence is explained as follows by the Eighth Circuit:

> The scope of our review here is extremely limited. We review the evidence only to determine whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The Arkansas Supreme Court's conclusion that the evidence was sufficient to support the conviction is entitled to considerable deference. *Id.* at 323. Indeed, whether the record contains sufficient evidence to establish each element of the crime beyond a reasonable doubt 'is everyday business for the state courts, grist for their mill, and it will be a rare case in which a federal court on habeas will disagree with them.' *Moeller v. Attorney General of South Dakota*, 838 F.2d 309, 310 (8th Cir. 1988).

Cassell v. Lockhart, 886 F.2d 178, 179 (8th Cir. 1989)

In this case, petitioner provided inconsistent and, in some respects, improbable prior statements about the night in question. Also, petitioner took out insurance on the deceased during their short marriage and exhibited greed toward the deceased's children. Viewing the evidence in the light most favorable to the State, a rational juror could have concluded that petitioner committed first degree murder by causing the death of his wife with premeditation and deliberate purpose. Ark. Stat. Ann. §41-1502(1)(b) [now Ark. Code Ann. §5-10-102(a)(2)]. We agree with the Arkansas Supreme Court that the evidence was sufficient to sustain the conviction.

Precharging Delay

Petitioner claims his defense was prejudiced because the state delayed nine years in bringing the charges.[2] This claim was raised in *Bennett II*. The State moves to dismiss the claim under the doctrine of procedural default because the claim was not reasserted in *Bennett III*. *Wainwright v. Sykes*, 433 U.S. 72 (1977) and its progeny provide that claims procedurally defaulted in state court will not be heard in federal court absent a showing of cause for the default and resulting prejudice.

The State contends it would not have been necessarily futile for petitioner to assert the claim at the third trial, quoting *Engle v. Isaac*, 456 U.S. 107, 130 (1982), "Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." Petitioner argues the issue was ruled on in the particular state proceeding and became the law of the case.

The procedural default doctrine requires that claims be presented to the highest state court. *Picard v. Connor*, 404 U.S. 270 (1971). The *Engle v. Isaac* language relied on by the State refers to the obligation of each defendant to raise constitutional claims rejected in other cases. Here, the argument was raised and rejected in this very criminal proceeding and became the law of the case. We believe the claim was adequately presented at the state level, find no default, and proceed to the merits.

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[2]In Arkansas there is no statute of limitations for murder in the first degree. *See* Ark. Code Ann. §5-1-109(a)(1987).

At the circuit court hearing on the motion to dismiss for precharge delay (transcript of hearing filed March 22, 1993 by respondent), FBI Investigator Jack Knox testified that items of tangible evidence were no longer available, including two fishing rods, a ring allegedly given by petitioner to Sheriff Dub Hamilton, and clothing of the deceased. According to Knox, these items would have corroborated Bennett's story that he was fishing on the evening in question. Knox also related that Carl Glass, a local attorney, died in the interim years and his file was unavailable, and petitioner argued to the judge that Glass was present at a meeting when petitioner gave statements to investigator John Bailey.

On appeal in *Bennett II*, the Arkansas Supreme Court found no prejudice resulted from the delay.

> Appellant next argues that his conviction must be reversed and dismissed because of a delay of nine years in the filing of charges. This argument is also without merit.
>
> On the day following the victim's death, the appellant gave a statement to the sheriff, a deputy sheriff, and a state police investigator. At the time the police did not know the victim had been murdered. The men met in a motel room in the presence of Carl Glass, appellant's attorney. Glass died in 1985, before the murder charge was filed.
>
> In dragging the river where the victim was found, the authorities found a coat, a blanket, and a lantern cover, which were identified as items worn or used by the victim. The sheriff took custody of some fishing

equipment found nearby as well as the aforementioned items found in the water. The appellant claimed that he gave the victim's ring to the sheriff; an assertion the sheriff denied. In any event, none of the aforementioned evidence could be produced by the sheriff's office by the time of trial.

The appellant contends that the delay in charging until after the death of the attorney was prejudicial and insists that when it is coupled with loss of the items of evidence from the sheriff's office, a dismissal of the charge is mandated.

We have recognized that there may be instances where prosecutorial delay in the bringing of charges may constitute prejudicial error requiring a dismissal of those charges. Simply because the statute of limitations has not run, the State is not justified in unduly delaying the filing of charges. *Bliss v.State*, 282 Ark. 315, 668 S.W.2d 936 (1984). The key element, of course, is whether or not a prejudice results which would require a dismissal.

All of the witnesses testified about the items of property recovered at the scene with the exception of the victim's ring. The testimony concerning the disposition of the ring would have been controverted regardless of whether the case had been tried immediately following the incident or several years later. Where no controversy existed regarding the items of property received by the sheriff, it cannot be said that,

> simply because the property was not physically present at the trial, prejudice occurred.
>
> Further, there is no allegation that the deceased attorney had any special knowledge which would have proved beneficial to the appellant at trial. Even though the attorney was present when the appellant gave his statement, the fact that he died before the appellant was charged fails to establish prejudice justifying a dismissal of the charges.

Bennett II, 302 Ark. at 181-82.

Petitioner asserts here the instances of prejudice advanced on appeal in *Bennett II* and also makes these arguments advanced at the circuit court hearing but not on appeal: Mr. Henson, who issued a fishing license to petitioner, died in 1978 and could not corroborate the fishing story; in 1980, on review of the complete investigative file, the prosecutor declined to bring charges; negligence by the successive county sheriffs caused the loss of the tangible items of evidence.

In ruling on a claim of precharge delay, we are guided by this language:

> Although statutes of limitations are the primary safeguard against prejudicial preaccusation delay, Meyer may establish a due process violation based upon preaccusation delay by showing that it resulted in actual prejudice and was intentionally and improperly motivated. *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30

> L.Ed.2d 468 (1971). To meet her heavy burden of establishing actual prejudice, she must prove that the preaccusation delay substantially prejudiced her defense. *United States v. Scott*, 795 F.2d 1245, 1249-50 (5th Cir. 1986) (mere passage of time plus unsubstantiated assertions of memory failure and loss of witness insufficient to establish prejudice). Furthermore, Meyer must demonstrate that the government intentionally delayed either to gain a tactical advantage or to harass her. *United States v. Lovasco*, 431 U.S. 783, 789-90, 97 S.Ct. 2044, 2048-49, 52 L.Ed.2d 752 (1977); *United States v. Carlson*, 697 F.2d 231, 236 (8th Cir. 1983).

U.S. v. Meyer, 906 F.2d 1247, 1251 (8th Cir. 1990); *see also Arizona v. Youngblood*, 488 U.S. 51 (1989).

In this case, petitioner has not shown he was prejudiced in defending the charges by the precharging delay. It was not disputed at the trial that petitioner and his wife were engaged in fishing activity at the scene. Also, we agree with the Arkansas Supreme Court that the disposition of the deceased's ring would have been a disputed matter from the outset. In any event, the ring's absence did not substantially prejudice the defense. Further, there is no indication that Carl Glass, identified by the Arkansas Supreme Court as petitioner's attorney, could have provided helpful testimony. Finally, there is nothing in the record persuasively demonstrating that the State intentionally and improperly delayed the proceedings to gain a tactical advantage.

Fair and Impartial Jury

Petitioner argued on appeal in *Bennett III*, as he does here, that the trial court erred in denying a motion for a new trial when it was discovered that one of the jurors was not a resident of Conway County as required by Ark. Code Ann. §16-31-102(a)(1); §16-31-101.

In upholding the trial court's ruling, the Arkansas Supreme Court explained that under §16-31-107, a verdict is void or voidable when a juror who fails to possess proper qualifications knowingly answers falsely to questions on voir dire relating to his qualifications. The court found that based on the juror's testimony on motion for new trial, however, it was obvious the juror did not knowingly answer any question falsely and the verdict was therefore not void or voidable.

Petitioner argues here that the juror "knowingly failed to disclose this disqualification to the Court" (amended petition at 8) and asks this court to find that the intentional nondisclosure strongly suggested partiality, citing *U.S. v. Colombo*, 869 F.2d 149 (2nd Cir. 1989). In this case, however, there was a hearing and full consideration in the state courts as to whether the juror honestly answered the questions presented her. The finding of the state courts that the juror was honest is entitled to a presumption of correctness in this proceeding under 28 U.S.C. §2254(d). *Smith v. Phillips*, 455 U.S. 209, 218 (1982). Further, although a correct answer by the juror would have shown she did not qualify for service, this was a matter collateral to whether she could render a fair and impartial verdict in the case. *See United States v. North*, 910 F.2d 843, 904-905 (D.C. Cir. 1990), *cert. denied*, 111

S.Ct. 2235 (1991), citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984).

Denial of Counsel

Petitioner claims that the trial court erred in refusing to allow his appointed counsel to argue an evidentiary point.

The Arkansas Supreme Court explained in *Bennett III* that petitioner, "[a]pparently against the advice of his own court-appointed attorney," insisted on actively participating in opening statement and cross-examination of witnesses and the trial court ruled that only one person at a time could participate in the defense so as not to "double-team" the prosecutor.

The trial transcript reflects that emergency medical technician Danny Sorey testified in part that when he was called to the scene petitioner's clothing was wet and petitioner advised he had been in the water between and hour to an hour and a half trying to locate his wife. Sorey explained that although the water temperature was thirty and thirty-five degrees, petitioner's temperature rose to normal within the thirty-minute ambulance ride to the hospital. Sorey also said he checked the contents of petitioner's wallet and the bills inside were dry.

Sorey admitted on cross-examination that he reported the night of the occurrence that petitioner was in the water for an undetermined length of time and suffered from shock and dizziness and that his testimony about petitioner warming up quickly in the ambulance was contradicted by emergency room reports. When petitioner showed other items from his wallet besides the money to Sorey, Sorey admitted he had seen the items

before and the items appeared stained and "could be" water stained from muddy water. When petitioner then asked to have the items entered into evidence as an exhibit,[3] the following exchange occurred:

> **Mr. Kirk:** Your Honor, I don't think they've laid any foundation for this, they haven't shown any kind of chain of custody in the last 13 years—
>
> **Mr. Irwin:** We're going to.
>
> **Mr. Kirk:** —in order to—
>
> **By the Court:** Sustained
>
> **Mr. Bennett:** The reason I didn't—
>
> **Mr. Irwin:** Hold on just a minute, Mr. Bennett.
>
> **By the Court:** I think you need to determine which lawyer is going to present this part of the case.
>
> **Mr. Irwin:** All right, Your Honor, I would like to present the matter before the Court. The State's attorney and I.
>
> **By the Court:** I believe Mr. Bennett is conducting the examination.
>
> **Mr. Irwin:** I'm not talking about an exami-

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[3] Petitioner did not testify at trial.

nation. I'm talking about a ruling the Court previously made concerning the exhibits.

By the Court: My ruling at this time is only one of you can present this.

Mr. Irwin: I'm not present it.

By the Court: Only one of you can speak. You can confer.

Mr. Irwin: May we confer?

By the Court: With each other, yes.

(Counsel and defendant conferred briefly)

Mr. Bennett: Your Honor, the documents, photographs and things that was in the wallet that night just came back to us through the chain of control that Mr. Kirk has had custody of these documents. We did not have custody of them. Mr. Kirk has had the custody of these documents up until about 15 minutes ago. Before we couldn't have presented them

Mr. Kirk: Your Honor, as I said, I checked these out from the Supreme Court Clerk's office about a month or so ago because they had them from a previous time. I'm certainly not going to verify their accuracy or that they portray what they appear to portray.

Mr. Bennett: Your Honor, these were in the chain of evidence with the State.

Mr. Kirk: I'm saying that I obtained those from the Supreme Court and I've had them in my possession for the last month or so I gave them to Mr. Bennett but I can't testify as to what happened before them.

By the Court: I'm not concerned about the chain of custody as much as I am about the identification and admissibility.

Mr. Bennett: Your Honor, these were entered into evidence before.

By the Court: Would you have any objection to them being admitted at this time, Mr. Kirk?

Mr. Kirk: As I said, Your Honor, I would object because I just don't see how they have laid a proper foundation.

Mr. Bennett: Your Honor, they show that they was in the water the same time as the wallet, muddy water stained.

By the Court: At this point, I have to sustain the objection as to the admissibility of those items.

Bennett III, T. at 254-56.

Petitioner did not contest the judge's evidentiary ruling on appeal but, rather, argued he was denied his sixth amendment right to counsel in making the evidentiary argument. The Arkansas Supreme Court found the trial court properly exercised its discretion in allowing only one person at a time to conduct the defense, that

petitioner was allowed to confer with his attorney before making his argument, and that he had failed to proffer to the trial court or on appeal how the attorney would have argued the point differently.

Here, petitioner exercised his right to self-representation under *Faretta v. California*, 422 U.S. 806, 835 (1975), but also desired counsel to aid him when necessary. A hybrid representation of this type is not mandated by the Sixth Amendment. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Even if it could be found that petitioner did not expressly and unequivocally waive his sixth amendment right to counsel as required, *see Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989), he had the aid of counsel prior to making the argument and, as stated by the Arkansas Supreme Court, nothing is shown as to how the argument would have differed if counsel had personally made it.

Expert Testimony

Petitioner claims the trial court erred in allowing Sheriff Kimbriel to testify as an expert and in limiting his cross-examination. The Arkansas Supreme Court stated on appeal in *Bennett III:*

> [T]he appellant argues that the trial court erred in allowing Sheriff Bill Kimbriel to testify as an expert witness. Kimbriel testified that it was not possible for the appellant, being over six feet tall, to jump from the bridge, a distance of twenty-five feet, into water four-to-five feet deep without breaking his legs and ankles from the impact. Appellant argued this identical point in *Bennett Ii*, and we held that the trial

court did not abuse its discretion because the sheriff qualified as having considerable experience concerning the subject of his testimony. Kimbriel's testimony was essentially the same as his testimony in *Bennett II*, and therefore the law of the case doctrine applies.

. . . .

Finally, the appellant argues that the trial judge erred in limiting his cross-examination of Sheriff Kimbriel after his testimony that it would be impossible for the appellant to jump off the bridge unharmed. Precisely, the appellant attempted to ask Sheriff Kimbriel, the following question: 'Then would you please tell me how an Olympic diver can come off a thirty-two foot board, feet first, and never hit the bottom at nine and half feet? They do it all the time in all the Olympic college meets.' The state objected to the question, and the trial judge instructed the witness that he did not have to answer. But, as the testimony continued, Sheriff Kimbriel stated that there was 'a lot of difference between diving and jumping.' Kimbriel partially added that 'he had never seen an Olympic diver jump off a . . . " at which point appellant interrupted the witness saying, 'that's okay, we won't go into that.'

The trial judge has considerable discretion in determining the scope of cross-examination. *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). We cannot say that the trial judge abused his discretion in instruct-

> ing Kimbriel that he did not have to answer the question. Kimbriel was not qualified as an expert on Olympic diving. In addition, from our review of the testimony, we believe that the appellant in fact got an answer to his inquiry but apparently not the reply he was seeking. In fact, appellant voluntarily abandoned this subject altogether after the sheriff responded.

Bennett III, 308 Ark. at 400.

Petitioner argues here that Kimbriel was not qualified as an expert witness under Ark. R. Evid. 702 and could not testify as he did under Rule 701 because he had no experience in the particular matter. Petitioner further suggests that the court erred in limiting cross-examination which would have shown the inaccuracy of Kimbriel's opinion.

We are guided by the following language of the Eighth Circuit:

> [Q]uestions concerning the admissibility of evidence are matters of state law, and are reviewable in federal habeas corpus proceedings only when the alleged error infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process. *Manning-El v. Wyrick*, 738 F.2d 321, 322 (8th Cir.) (per curiam), *cert. denied*, 469 U.S. 919, 105 S.Ct. 298, 83 L.Ed.2d 233 (1984). 'In order to establish denial of due process, [Ferguson] must prove that the asserted error was so conspicuously prejudicial or of such magnitude that it fatally infected the trial and deprived him of fundamental fairness.' *Id.*

> at 323. In making this determination, we review the totality of the facts in the case and analyze the fairness of the trial. *Id.*

Ferguson v. Jones, 905 F.2d 211, 213 (8th Cir. 1990).

Kimbriel testified at trial in *Bennett III* that he spent twenty-one years in the United States Marine Corps and had jumped from a forty foot tower into twenty to twenty-five feet of water in abandon ship training. He opined that if a man of his size jumped from twenty-five feet straight down into five feet of water, it would probably break his legs. He admitted he had never made such a jump

Here, it appears Kimbriel qualified under Rule 702 as having specialized knowledge based on training and experience. Even if improperly admitted, however, petitioner's question about Olympic divers was heard by the jury as was Kimbriel's answer that there was a difference between jumping and diving. In addition, there was other evidence before the jury to discount petitioner's claim of jumping in the water, as his contested statements to authorities that he wore his glasses the whole time and the current in the river was strong. Thus, the admission of the evidence was not so prejudicial as to amount to a due process violation.

Testimony of Deceased's Daughter

As discussed above, Gloria Good, the deceased's daughter, testified at trial in *Bennett II* and *III* that after her mother's death petitioner acted strange and cold toward her and her siblings and displayed greed in his dealings with them. Petitioner objected to the testimony in *Bennett III* and the State advised that the purpose of the

testimony was to show motive, intent, preparation, plan and absence of mistake or accident under Ark. R. Evid. 404(b). The Arkansas Supreme Court did not consider this claim on appeal in *Bennett II*, explaining it was not raised in *Bennett II* and petitioner was prevented from raising it under the law of the case doctrine.

Petitioner argues here the evidence was not relevant and was designed to arouse sympathy and prejudice. As pointed out by the State, the prosecution's version of the case was that petitioner killed his wife for financial gain. The witness' testimony was relevant on the issue of intent and no due process violation is shown.

Miranda Warnings

Petitioner claims that the trial court erred in admitting into evidence a statement he made to John Bailey of the Arkansas State Police in March 1978 without *Miranda* warnings.

This argument was advanced in *Bennett II* but not *Bennett III*, and the State argues the claim was procedurally defaulted when not advanced in the third trial. For reasons stated above when discussing the claim of precharging delay, we find the claim was adequately presented at the state level and will proceed to the merits.

At the suppression hearing in *Bennett II* (transcript filed on April 1, 1993, by respondent), Sheriff Kimbriel, a deputy when the statement was given, testified Sheriff Hamilton contacted petitioner about scheduling an appointment to take his statement. Kimbriel said it was his understanding that petitioner wanted his lawyer, Carl Glass, present at the interview and made arrangements to have him present. Kimbriel recalled the interview was

held at the local motel where petitioner was staying and those present were petitioner, Glass, himself and John Bailey of the Arkansas State Police. He remembered that Glass was in the room both before and after the officers arrived. He admitted he was suspicious from the first about the incident but that initially he thought it was an insurance fraud case instead of a homicide. Kimbriel said no force or coercion was used and petitioner was merely asked to relate what happened. He admitted he was in uniform and carried a gun but recalled that Bailey was in civilian clothes. He pointed out that petitioner was not arrested as a result of the statement.

John Bailey testified at the suppression hearing that the statement was given on March 27, 1978, shortly after the death of Mrs. Bennett. He recalled identifying himself at the interview as an investigator for the Arkansas State Police and giving no *Miranda* warnings. Bailey said at this time he had no opinion as to whether the death was a homicide or accident but that petitioner was a suspect in Kimbriel's mind. It was his opinion that Glass attended the interview as a friend and business associate of petitioner, not as an attorney representing a suspect. Bailey denied using threats or coercion.

Petitioner testified at the suppression hearing that Glass arrived at the interview with the law enforcement officers. He did not know why Glass was there and said Glass gave him no advice. He admitted Glass was to obtain a liquor license for him for the store. He recalled the officers stood between him and the motel door as he sat on the bed.

The trial court found that petitioner was not in

custody and, further, that the "credible evidence" showed that petitioner requested and had a lawyer. The Arkansas Supreme Court upheld the denial of the motion to suppress. Petitioner argues here he was in custody and Glass was not acting as his counsel.

Custodian interrogation requiring *Miranda* warning occurs when "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983). Warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Rather, under the totality of the circumstances approach, we are apply the six factors announced in *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990):

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive strategems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of

the questioning.

Id. at 1349. *See Jenner v. Smith*, 982 F.2d 329 (8th Cir. 1993); *U.S. v. Mottl*, 946 F.2d 1366 (8th Cir. 1991);

In this case, the questioning was conducted in petitioner's motel room. The state courts found that Glass attended the interview in the capacity as counsel but, in any event, his attendance was at least in the capacity of friend and associate. No force or coercion was used on petitioner and he was not arrested after the interview. Four *Griffin* factors weigh in favor of finding no custody, i.e., petitioner's unrestrained freedom of movement during questioning, the lack of strong arm tactics or deceptive strategems employed during questioning, the atmosphere was not police dominated, and petitioner was not placed under arrest at the termination of the questioning. We agree with the state court that petitioner was not in custody.

Cumulative Error

Petitioner argues the conviction should be set aside based on cumulative error. As pointed out by the State, there is no recognized cumulative error claim giving rise to habeas corpus relief because each claim must stand or fall on its own. *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990).

Conclusion

Based on the above, we recommend denial of this petition.[4] The parties have ten days from receipt of our report and recommendation in which to file written objections pursuant to 28 U.S.C. §636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court.

Dated this 8th day of April 1993.

BEVERLY R. STITES
United States Magistrate Judge

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[4] "A federal court may dismiss a claim without an evidentiary hearing where the allegations are frivolous, where the allegations fail to state a constitutional claim, where the relevant facts are not in dispute, or where the dispute can be resolved on the basis of the record." *Urquhart v. Lockhart*, 726 F.2d 1316 (8th Cir. 1984).

Judgment of the District Court

In the United States District Court

Western District of Arkansas

Fort Smith Division

Richard Bennett, Petitioner,

v. No. 92-2095

A. L. Lockhart, Director,

Arkansas Department of Correction, Respondent.

In accordance with the order entered this same date, the court hereby dismisses the petition.

Entered this 16th day of December, 1993.

JIMM LARRY HENDREN

United States District Judge

Order of the District Court

In the United States District Court
Western District of Arkansas
Fort Smith Division

Richard Bennett, Petitioner,

v. No. 92-2095

A. L. Lockhart, Director,
Arkansas Department of Correction, Respondent.

Now, on this 16th day of December, 1993, comes on for consideration the Magistrate Judge's Report and Recommendation regarding petitioner's habeas corpus action under 28 U.S.C. §2254. The Magistrate Judge recommends that the petition be denied.

In his objections, petitioner merely stated that he objects to the findings and recommendations of the Magistrate "for the same reasons set forth in Petitioner's Amended Petitioner. Petitioner refers to his Amended Petition for the arguments and citations thereunder."

Subsequent to the filing of the objection, petitioner sent to the Court excerpts of what he considered to be inconsistent testimony of witnesses who testified in all three trials *(Bennett I, Bennett II, and Bennett III)*. He asks the Court to consider the inconsistencies, and to review the points he raised. He also attached a clipping about Sheriff Kimbrell in an unrelated case, believing it displays Kimbrell's lack of credibility. It appears from these documents that defendant's main objection goes to the question of the sufficiency of the evidence. The Court will therefore now consider petitioner's objections, as raised in the Amended Petition and the documents he has presented to the Court.

This Court has conducted a *de novo* review of this matter, and has completely reviewed the testimony given in *Bennett III,* as well as the alleged inconsistencies in testimony brought to the Court's attention by petitioner. The Court does not dispute that there are inconsistencies in the testimony presented by many of the witnesses in the three different trials. However, the Court also notes that these inconsistencies were brought to the jury's attention in *Bennett III.* In fact, Mr. Bennett himself conducted much, if not all, of the cross-examination of the witnesses in *Bennett III,* and very capably and carefully attempted to impeach the witnesses by pointing out the inconsistent testimony given in the prior trials.

In *Bennett III,* the Arkansas Supreme Court stated the evidence was particularly detailed in *Bennett I.* The Court in *Bennett II* stated that essentially the same evidence was presented in *Bennett II* as was presented in *Bennett I,* and such being the case, the doctrine of the law of the case applies and sufficiency of the evidence is not a ground for reversal.

In *Bennett III,* the Arkansas Supreme Court stated:

> In *Bennett II,* we refused to address the appellant's sufficiency of the evidence argument citing the doctrine of law of the case. The doctrine of law of the case prevents an issue raised and decided on first appeal from being raised in a subsequent appeal, unless the evidence materially differs between the appeals. *Findley v. State,* 307 Ark. 53, 818 S.W.2d 242 (1991); *Henderson v. State,* 284 Ark. 493, 684 S.W.2d 231 (1985). Again, we refuse to address the

> appellant's sufficiency of the evidence issue because of the law of the case doctrine. Except for Mosier's testimony, the evidence presented in the *Bennett II* and the present case was essentially the same evidence.

Id. 308 Ark. at 396.

In *Bennett III,* Mosier and Buckner did not testify.[1] As indicated by the Magistrate Judge, Gloria Good, who also testified in *Bennett II,* testified that her mother died three months after her marriage to petitioner who became cold and financially greedy to her and her siblings after her mother's death.

The Court will reiterate the scope of review of a claim of insufficient evidence, as explained by the Eighth Circuit:

> The scope of our review here is extremely limited. We review the evidence only to determine whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *Jackson v. Virginia*, 443 U.S. 397, 319 (1979) (emphasis in original). The Arkansas Supreme Court's conclusion that the evidence was sufficient to support the conviction is enti-

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[1] In *Bennett I,* Bennett's former girlfriend, Connie Mosier, testified by deposition. Also in *Bennett I,* Don Buckner, Bennett's insurance agent from Ohio, testified by deposition. As stated by the Magistrate Judge, the *Bennett I* conviction was reversed because the Mosier and Buckner depositions were improperly introduced into evidence.

> tled to considerable deference. *Id.* at 323. Indeed, whether the record contains sufficient evidence to establish each element of the crime beyond a reasonable doubt 'is everyday business for the state courts, grist for their mill, and it will be a rare case in which a federal court on habeas will disagree with them.' *Moeller v. Attorney General of South Dakota*, 838 F.2d 309, 310 (8th Cir. 1988).

After considering all of the testimony given in *Bennett III*, and the specific objections submitted by petitioner, the Court finds that viewing the evidence in the light most favorable to the State, a rational juror could have concluded that petitioner committed first degree murder by causing the death of his wife with premeditation and deliberate purpose.

With respect to petitioner's other arguments, petitioner has not raised specific objections other than to refer to his previously filed Amended Petition. The Court has considered petitioner's arguments and finds the Magistrate Judge's conclusions to be well founded in law and fact, and petitioner has not presented any further arguments which convince the Court otherwise.

ACCORDINGLY, the Court finds the Magistrate Judge's report and Recommendation should be adopted in its entirety. The Court hereby dismisses the petition.

IT IS SO ORDERED.

JIMM LARRY HENDREN
United States District Judge